United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

494

No. 21,993

KENNETH L. HOLLEY, Appellant

v.

THE UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court
for the District of Columbia

Albert Philipson, Esq.
Counsel for appellant
(appointed by this Court)
838 - 17th Street, N.W.
Washington, D.C.

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TABLE OF CASES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether it was error for the trial court to permit the Government to impeach a defense witness as to matters collateral to the ones in issue, through the introduction of the witness' testimony in a prior trial of the case and the calling of a rebuttal witness, and to allow the Government to argue the impeachment in its closing statement when the witness had testified on no matters relevant to the substantive issues being tried.

II. Whether in a trial for assault with a dangerous weapon and robbery it was error for the trial court not to sustain appellant's motion for judgment of acquittal based on the lack of substantial evidence when there was no evidence as to the nature of the weapon used, save that it was a "rock", and where there was no evidence that the victim's injury was other than slight.

III. Whether it was error for the trial court to proceed without the Government having made available to the appellant, upon appellant's demand, a search warrant and affidavit in support thereof which the Government had taken from the Criminal Clerk's office.

(This case has not been before the Court of Appeals for the District of Columbia previously.)

STATEMENT OF THE CASE

Appellant was indicted on May 29, 1967 of the crimes of robbery (22 D.C.C. 2901) and assault with dangerous weapon (22 D.C.C. 502), arraigned July 7, 1967, pleaded not guilty, and tried twice. The first trial (February 12 to 15, 1968) was declared a mistrial on account of the jury being unable to agree, while the second (March 11 and 12, 1968) resulted in conviction on both counts. Sentence, on May 6, 1968, was pursuant to the provisions of the Federal Youth Correction Act, 18 U.S.C. 5010(b).

Jurisdiction of this Court is given by 28 U.S.C. 1291.

On the evening of March 11, 1967, Donald Taylor, a Special Police Officer, was on duty at a shopping center in the area of Central and Southern Avenues, Southeast D.C. Close to 5:30 P.M., he arrested Sherman Smith for disorderly conduct (Tr. 20) and placed a call to the police for transportation of the prisoner (Tr. 21). While awaiting assistance he was struck on the back of the head by an unknown object and his gun was taken. (Tr. 21-22; Affidavit in support of search warrant, Exhibit #1, attached at end of this brief.) Officer

Mosrie arrived shortly afterward (Tr. 35) and through talking to Taylor (Tr. 35, 37) learned that he was struck from behind by one person allowing another to take his gun. (Tr. 30, clf.; Tr. 27; and Exhibit #1.) Sherman Smith told Officer Mosrie that the one who took the gun was called "Monk" (attached affidavit). Smith did not testify at the trial. Relying on this information and that obtained through an unidentified informer (attached affidavit), Officer Mosrie obtained and executed a search warrant at appellant's home on March 16. Nothing was found. Officer Mosrie talked to William Ward and William Jackson, employees of the Seymour Liquor Store, on March 17 (Tr. 41). There was no testimony as to what Jackson and Ward told Mosrie. Appellant was arrested on March 18, 1967 (Tr. 37).

The defense was alibi. Appellant testified that he had been in the area of Central and Southern Avenues at about 8:00 P.M. that evening (Tr. 70), that he had an altercation with Ward and then went to his girlfriend's house shortly before 8:30 (Tr. 71, 72). Claythea Taylor, appellant's girlfriend, testified that the appellant arrived around 8:00 or 8:30 (Tr. 141).

SUMMARY OF ARGUMENT

I. A defense witness, Grace Holley, testified on direct and re-direct on certain collateral matters. Some of these matters were the subject of a lengthy impeachment attempt on the part of the Government through the introduction of inconsistent statements made at a prior trial and a rebuttal witness. The impeachment of a witness on collateral matters is contrary to well settled judicial authority, was prejudicial to the appellant, and the allowance of it was error.

II. In order to sustain a conviction for assault with a deadly weapon, there must be some evidence that the weapon used was dangerous, per se or from the circumstances of the assault. In the case at hand, there was insufficient evidence for the jury to conclude the weapon used was dangerous per se, and the only evidence of injury indicated that it was slight. There was, then, a lack of substantial evidence upon which the jury could reasonably return a verdict of guilty, and thus it was error for the trial court not to grant appellant's motion for judgment of acquittal on this charge.

III. The Government had obtained custody over the search warrant and affidavit issued in connection with this case. A duty thus arose to keep the documents in such manner that it would be available for the appellant's use. The Government breached this duty by not returning the document to the Clerk's office nor producing it at the trial upon appellant's request. Such action on the part of the Government prejudiced appellant in presenting his defense, and it was error for the trial court to proceed without the documents available to the appellant.

ARGUMENT

I.

(In regard to this point, the attention of the Court is respectfully directed to Tr. 97-127, and Tr. 150.)

On direct examination, Grace Holley (mother of appellant) was asked about the visits made to her house by the police in connection with this case. She was not certain of the date of the first visit but thought it was March 16 (Tr. 97). Further, she stated that on the second occasion they searched her home and arrested her son, and that that was the last time they came (Tr. 100). In response to a leading question, however, she answered that the police came three times, the last being the time they arrested him (Tr. 101).

On cross-examination she re-affirmed that the first time police came was on March 10, not a Sunday, and that Officer Mosrie was there each time the police came (Tr. 103). Then she testified that the police came on a Sunday, March 12, but that this was the second time and was when they arrested her son (Tr. 105, 106). Shortly after this, the Government's attorney approached the bench, stated her intention of impeaching Mrs. Holley through the witness' prior testimony to the effect that there were only two visits by the police (Tr. 109). The Court was of the opinion that this matter was such that impeachment would be proper (Tr. 110) and adjourned until the transcript was prepared. The following day portions of Mrs. Holley's testimony in the previous trial of this case was read in open court and she was questioned in reference to it.

The testimony of Grace Holley which is inconsistent is as follows: Statement prior trial: police came twice (Tr. 121); statement second trial: police came three times (Tr. 101). Prior trial statement: police searched the first time they came (Tr. 120; second trial statement: police searched the second time (Tr. 100). Prior trial statement: police arrested the second time they came (Tr. 122, 123); at second trial: police arrested the third time they came (Tr. 101).

Prior trial statement: police came the first time on March 12 (Tr. 121); statement second trial: the first time the police came was March 16 (Tr. 17).

Officer Mosrie was called as a rebuttal witness. His testimony was inconsistent with Mrs Holley's insofar as he indicated that he came to her house only two times and was never there on Mardh 12, 1967 (Tr. 150), while Mrs Holley had testified that the police came three times. (Tr. 101).

It is well settled that is improper to permit the impeachment of a witness as to issues collateral to the ones in issue. Ewing v. U.S. , 77 U.S. App. D.C. 14, 135 F 2d 633 (1942); Ross v. U.S., 374 F 2d 97 (1967); 3 Wigmore, Evidence (3 ed. 1940) sec. 1003. Further, the inquiring party is conclued by the witness' answer when the inquiring party's cross-examination relates to a matter collateral and he may not later rebut it for purposes of impeachment. Ewing, supra. 21; Stevens v. Consolidated Mutual Insurance Company, 352 F 2d 41; State v. Oswalt, 62 Wash. 2d 118, 381 p 2d 118 (1963).

The test as to whether matter is collateral is whether it concerns matter which a proponent would be allowed on his own part to prove in evidence independent of the self contradiction --i.e., if the witness said nothing on the subject. Ewing, supra: State

v. Oswalt, supra. In applying the test, the fact that Mrs. Holley testified on a matter does not alone make such matter non-collateral. Ewing, supra. 22.

The appellant's defense was one of alibi established through his own testimony and that of his girl friend Claythea Taylor. This defense would stand or fall independent of whether it was shown that the police came two or three times to Mrs. Holley's home, the dates they came and what occured during these visits. The Government's theory of the occurrence would not in any way be affected if Mrs. Holley's testimony stood uncontradicted. Viewed from either the theory of the appellant or the Government, the visits by the police to the appellant's home after the crime occurred were collateral; Mrs. Holley's testimony on these collateral matters was itself collateral. State v. Oswalt, supra.

Some courts, however, have permitted the impeachment of collateral matters by finding an exception to the general rule when a witness has given other testimony material to one party's of the substantive issues. U.S. v. Borash, 365 F 2d 395 (1967). Likewise, when the defendent testifies, courts have sometimes permitted impeachment of collateral matters to which the defendent has testified since the defendent, in addition to the collateral matters, has testified to other matters materia to the substantive issues of the case. Dillon v. U.S. 391 F 2d 433; U.S. v. Currey, 358 F 2d 904 (1966).

In this jurisdiction the case on this point is Ewing, supra. In that case, while recognizing the general rule prescribing impeachment on collateral matters, a rebuttal witness was allowed to testify as to a prior inconsistent statement of the defense witness who had given other testimony material to the substantive issues; testimony which, if believed, would have foreclosed a verdict of guilty.

Mrs. Holley's testimony in no way established the appellant's defense of alibi. No part of her testimony had anything to do with the Government's theory of the case. It is clear that nothing she said would have foreclosed a verdict of guilty if it had been believed by the jury.

One of the policy reasons underlying the rule is the prevention of confusion of issues. Ewing, supra 24; 3 Wigmore, Evidence (3 ed. 1940) sec. 1018; State v. Oswalt, supra. The Government, however, in closing argument, brought about that very situation that the rule is directed against by suggesting to the jury that they might use the inconsistency of Mrs. Holley's testimony of collateral matters as a basis for disbelieving the appellant when he said that he was not the one who assaulted and robbed Taylor (Tr. 168).

Although no formal objection was made to the introduction of the prior testimony, both the appellant and the Government had agreed previously that it would be best that the matter of the first trial not be brought to the jury's attention (Tr. 56). Moreover, the trial judge weighed the matter and expressed his opinion that the Government's action would be permissible (Tr. 110). His decision in this instance was error.

II.

(In connection with this point, the Court is directed to Tr. 30 and 50.)

When determining whether a weapon should be classified as dangerous, courts have looked to the nature of the weapon itself or the circumstances of the assault. The nature of some weapons is dangerous per se, and when this is so, the fact that there is no injury does not lessen the crime from one of assault with a dangerous weapon: a pistol used as a club, McGill v. U.S., 106 U.S. App. D.C. 136, 138, 270 F 2d 329 (1959); loaded gun capable of being fired, People v. Corson, ___ Cal.App. ___, 34 Cal. Rptr. 598 (1963). Other weapons, not dangerous per se, may be held to be dangerous by virtue of their use in a particular case, as when a serious injury was inflicted: e.g., a razor, the use of which caused an injury requiring fifty stitches, Josey v. U.S., 77 U.S. App. D.C. 321, 135 F 2d 286 (1943); shoes on feet

causing serious injury, Medlin v. U.S., 93 U.S.App.D.C. 64, 207 F 2d 33,(1953); caustic acid (lye) causing temporary blindness and severe burns, Tatus v. U.S., 71 U.S.App. D.C. 393, 110 F 2d 555 (1940); pocket knife, injury from which caused victim to be hospitalized and undergo an operation, People v. Kersey, ___Cal.___, 316 P 2d 52 (1961).

In the case at hand, only Jackson testified seeing appellant strike Taylor with a rock (Tr. 34, 50). The weapon was not introduced into evidence and there is no testimony as to its supposed size or shape. It is common knowledge that rocks come in all sizes, shapes and weights. To describe an object simply as a rock does not in any way give any basis for concluding that the particular rock with which Taylor was struck was any larger or any smaller than any other rock one might find. But it can hardly be said that any or every rock is per se a dangerous weapon.

In cases of this sort, where there is no evidence as to the quality of the weapon used, the best indication of whether a weapon is dangerous or not is the injury resulting therefrom. Hopkins v. U.S., 4 Court of Appeals District of Columbia 430, 432 (1894). Taylor's injury in this case was a "loss of consciousness", but not enough to prevent him from feeling his gun being taken. (Tr. 22) This loss of consciousness did not prevent him

from retaining Sherman Smith as a prisoner although Smith was still struggling with Taylor when Mosrie arrived (Exhibit #1). Mosrie did not call an ambulance for Taylor. There is no evidence that Taylor required or received medical treatment. There is no evidence whatsoever of any serious injury.

In view of the lack of any evidence of the nature of the weapon used and of the seriousness of the injury, there was no substantial evidence upon which the jury could reasonably rely in finding the appellant guilty of assault with a dangerous weapon. Thus it was error for the trial court not to sustain appellant's motion for judgment of acquittal.

III.

(In connection with this point, the Court's attention is directed to Tr. 23-24, and to Exhibit #1, attached at the end of this brief. The references in the transcript to "Bench Warrant" is a mistake. Those references should be to "Search Warrant".)

The Government removed from the Criminal Clerk's office the search warrant and supporting affidavit issued in connection with this case and made it available to the appellant during the first trial. At the second trial the Assistant U.S. attorney failed to produce the documents, explaining that she had thought the documents were in her file but that apparently they had been returned to the Clerk's office (Tr. 23). The appellant

insisted that he would have to have it (Tr. 23). The trial court was satisfied that the Government had produced all the documents it was required to and ordered that the trial proceed.

A subsequent check at the Criminal Clerk's office revealed that the documents were not there and that, in the place in the Clerk's file where they should be, was a receipt indicating that the Government removed them on February 13, 1968. The Clerk's office has not yet been able to find them. When the government removed the documents a duty arose that they keep the documents in such manner that it would be available to appellant. U.S. v. Consolidated Laundries Corporation, 291 F 2d 563 (1961). The Government could have fulfilled this duty by returning the documents to their proper place in the Clerk's office or by having made them available when the appellant requested them. Here the Government did neither, but rather left the appellant and the trial court under the impression that the search warrant and affidavit were no longer in the custody of the Government.

The documents would have been helpful to the defense insofar as they contradicted the testimony of the complaining witness (Taylor), who testified that he had made no statements to the police in connection with the incident (Tr. 25, 27). Moreover, since the

production of the documents was the right of the appellant, this Court should be reluctant to speculate whether they could have been utilized effectively. Clancy v. U.S., 365 U.S. 312, 316, 81 S.Ct. 645, 648, 5 L.Ed. 2d 574 (1961).

It was error, then, for the trial court to order that the trial proceed without the search warrant and its supporting affidavit being made available to the appellant.

CONCLUSION

Due to the aforementioned errorsoccurring in the trial below, appellant requests this Court to enter a judgment of acquittal on the charge of assault with a dangerous weapon and to grant a new trial on the robbery charge.

Respectfully submitted,

Albert Philipson
Counsel for appellant
(appointed by this Court)
[illegible] - 17th Street, N.W.
Washington, D.C. 20006

USW 994-67

AFFIDAVIT RELATIVE TO A REQUEST FOR A DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS SEARCH WARRANT FOR THE ENTIRE PREMISES LOCATED AT 103 - 58th STREET, S.E., WASHINGTON, D.C., OCCUPIED BY A NEGRO, MALE KNOWN AS "MONK."

Donald Taylor, Negro, male, 27 years, a Special Police Officer, employeed by Commando K-9 Detectives, Inc., located at 422 Washington Building, Washington, D.C., reports that about 8:30 PM, Saturday, March 11, 1967, while at Central Avenue and Southern, S.E., D.C., and placing a subject (later identified as Sherman (nmn) Smith, Negro, male, 20 years of 404 - 16th Street, SE) under arrest for disorderly conduct, he was attacked from behind by 3 or 4 Negro, males, one of whom struck him in the back of the head with an unknown object, allowing another subject to grab his .38 caliber "Smith & Wesson" revolver (Serial #488350) from his holster.

About 8:35 PM, March 11, 1967, Saturday, the undersigned responded to Central Avenue and Southern Avenue, S.E., D.C., for a call of a "policeman in trouble." Upon arrival the undersigned observed the above named police officer struggling with the afore-mentioned Sherman Smith. The undersigned assisted in placing Smith under arrest for disorderly conduct and assault. Upon learning that the officer's revolv had been stolen, the undersigned asked Smith if he had seen who had taken the gun. Smith replied that a subject known to him as "Monk" who lived in the 100 block of 50th Street, SE had taken the gun. Smith was unable to give any further information concerning this subject.

On Monday, March 12, 1967, at about 4:00 PM, the undersigned received information from an informant thatthe subject known as "Monk" lived at 103 - 58th Street, S.E.

In view of the foregoing information the undersigned has probable cause to believe that the above described revolver is presently located inside the premises 103 - 58th Street, S.E., and therefore requests that a D.C. Court of General Sessions Search Warrant be issued authorizing the seizure of said revolver which is the proceeds of crime.

x Arif H. Mogrie

Arif H. Mogrie
Plainclothesman
Criminal Investigation Division

Subscribed and sworn to before me this 16th day of March, 1967.

Cecil D. Howard

JUDGE, D.C. COURT OF GENERAL SESSIONS

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,998

KENNETH L. HALLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID C. ACHESON,
United States Attorney,

FRANCIS D. MORRISSEY,

DAVID B. TOFFEY,

Assistant United States Attorneys.

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Was the use of prior inconsistent testimony of Mrs. Holley and the rebuttal testimony of Detective Mosrie reversible error, where:

   a. No objection was raised in the trial court;
   b. the Government used Mrs. Holley's prior testimony only to cross examine and as to that testimony was "concluded" by her admissions; and
   c. where the case against appellant was such that the alleged error could have no possible effect on the verdict?

2. Was the failure of the trial court to grant appellant's motion for judgment of acquittal on the charge of assault with a dangerous weapon reversible error where:

   a. Appellant does not contest the sufficiency of the charge for which he received a concurrent sentence; and
   b. evidence that appellant threw a rock at the complainant causing the latter's unconsciousness provided sufficient evidence for the jury to determine the question of "dangerousness" of the weapon?

3. Was the failure of the Government to provide an alleged Jencks Act Statement, not in its possession at the time of trial, reversible error, where:

   a. Information on the statement was revealed by other statements given appellant by the Government;
   b. where the defense neither requested a recess to secure the statement, nor objected when the trial court requested he proceed with the statements that he had been given?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,993

KENNETH L. HOLLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed June 26, 1967, appellant with robbery (22 D.C. Code § 2901), and assault with a dangerous weapon (22 D.C. Code § 502), on one Donald E. Taylor, on or about March 11, 1967. At his first trial held on February 12 through 15, 1968, the jury was unable to agree and a mistrial was declared. At his second trial, held March 11 and 12, 1967, before United States District Court Judge William B. Bryant sitting with a jury, appellant was found guilty as charged. On May 6, 1968, appellant sentenced on both charges pursuant to 18 U.S.C. § 5010(b) of the Federal Youth Corrections Act.

The Government's Case

The first witness called by the Government was the complainant, Donald E. Taylor, who testified that on March 11, 1967 he was employed as a special policeman by the Commando K-9 Detective Agency, assigned to a shopping center located at Central and Southern Avenues, S.E. At approximately 8:30 p.m., Taylor was in the process of arresting one Sherman Smith for disorderly conduct in front of the Seymour Liquor Store located there. Taylor testified that while using a call box to phone the police precinct he was hit in the back of the head and lost consciousness and felt his gun being taken. He testified that the call box was located near the liquor store and that he had previously recognized the appellant, whom he knew only as "Monk" standing with a crowd of ten to twelve others in front of the liquor store at the time of the arrest (Tr. 19-22).

On cross-examination,[1] the witness stated that he did not know who attacked him from behind, and denied making a statement to the police about this case but admitted going to the police station with regard to the arrest of Sherman Smith (Tr. 25-26). At this point counsel for the defense, referring to certain Jencks statements that

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[1] Just prior to cross-examining Taylor, defense counsel approached the bench for the Jenck's Statements in the possession of the Government. The Government gave to the defense Police Department Form 163, Police Department Form 251 (see supplemental record filed February 6, 1969), and certain other statements made to a secretary of the United States Attorney's Grand Jury Section (Tr. 22-23). The Government also mentioned that another document had been produced at the previous trial, erroneously described as an affidavit to a bench warrant, (in actuality it was an affidavit to a search warrant), which the Government stated it did not have, and assumed had been returned to the Criminal Clerk's Office of the District Court from which it had been originally secured (Tr. 23). Defense counsel indicated that he thought he had had it before the last trial and that he had to have it, but made no request for a recess nor did he make any formal objection when the trial court requested that he proceed with what statement's he had been given (Tr. 23-27).

had been given to him by Government counsel, asked Taylor whether he had made a statement to the police that he had been attacked by one man and that somebody else took his gun. Taylor reasserted that he had made no statement to the police in regard to appellant's case (Tr. 27).

William Herman Jackson was next called by the Government and stated that on the night in question he was employed as a clerk in Seymour's Liquor Store, and knew the complainant Taylor as a guard working there. He testified also to knowing the appellant whom he had seen around the store frequently and whom he knew only as "Monk". At approximately 8:30 p.m., on that evening, Jackson observed a gang of teenagers around Taylor who was trying to make an arrest. He stated that he then saw appellant pick up a rock, step behind Taylor, throw the rock at Taylor's head, grab the special officer's gun and run (Tr. 28-31). On cross, Jackson indicated that the call box was approximately five feet from the store. He denied that the assault and the robbery were commited by two persons or that four or five others there were attacking Taylor (Tr. 32-34).

The Government next called Detective Arif H. Mosrie, who at the time of the alleged offense was assigned to the Fourteenth Precinct. Mosrie stated that he responded to the area of Central and Southern Avenues, S.E. at approximately 8:35 p.m., seeing Taylor there. He also testified to executing a search warrant at the home of the appellant on March 16, finding nothing in the home and that later on March 18, he went to appellant's home and arrested him (Tr. 35-37).

On cross, Mosrie stated that the complainant did talk to him on the evening of the offense at the police precinct and told him that he could not identify who had attacked him. The detective stated that Taylor had told him that he had been "copped" from behind by three or four persons, and that someone else had taken the gun. Detective Mosrie also testified that the complainant never told him that appellant was known as "Monk", that the complainant didn't know appellant (Tr. 37-38).

Mosrie indicated that he recalled appellant's mother and father being at the house when he searched on March 12. The witness stated that while there he spoke with the appellant but did not interrogate him at any length, asking appellant to tell him where the gun was to save having to search through appellant's personal effects. Mosrie indicated that he had probable cause to believe that the appellant had committed the crime at the time of the search. When Mosrie came back to the house with the arrest warrant, he stated that the appellant was arrested in the back yard (Tr. 38-41). On re-direct, Detective Mosrie testified that Taylor told him that he did not see who had struck him or had taken his gun as his back was turned. Mosrie stated that on March 17, he spoke with Messrs. Ward and Jackson, employees of the Seymour Liquor Store about the case (Tr. 40).

Mr. Ernest L. Ward was the last witness called by the Government in its case-in-chief. Mr. Ward who at the time of the offense was employed at the Seymour Liquor Store, recalled that the appellant was an habitué of the liquor store area. The witness noted that on March 11, the appellant had been in the liquor store on several occasions, and that he had seen appellant with someone he knew as "Jappo".[2] Later that evening at approximately 8:30 p.m., Ward testified that while Taylor was trying to arrest "Jappo", he saw the appellant snatch the special policeman's gun and run away (Tr. 50-53). Mr. Ward, on cross-examination denied having had an argument with appellant that day or that he ordered the appellant out of the store, or that he disliked the appellant. Ward admitted that he did not see anyone throw a rock at the complainant (Tr. 53-55). The defense then moved for a judgment of acquittal, which was denied (Tr. 64, 66).[3]

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[2] Sherman Smith, the man arrested by Special Officer Taylor is variously referred to as "Jappo" (Tr. 53), "Gabbo" (Tr. 55) and "Jabbo" (Tr. 76).

[3] The motion for judgment of acquittal was based solely on the ground of alleged inconsistencies between the testimony of complainant Taylor and Detective Mosrie (Tr. 64-66).

The Case for the Defense

As its first witness the defense called the appellant, who related that he had been to the liquor store that day, and at approximately 8:00 p.m., had an altercation with Ward who ordered him out of the store. Appellant indicated that they came to blows and that after they were separated, Ward left the store and went around the corner to his car. Appellant stated that he saw Mr. Ward take a pistol from his car and came after him. The appellant said he retreated calling the attention of the special policeman there to what was happening, whereupon the policeman told him to go and that he would take care of the situation. Appellant indicated that he left the area at approximately 8:23 p.m. arriving at his girlfriend's house, some five blocks away, at approximately 8:30 p.m. Holley denied the charges against him and also denied seeing "Jabbo" that night. When Detective Mosrie came to his house some four days later, appellant stated that the detective told him that if he did not come up with the gun, he would be charged with robbery and assault and with robbing a bus driver (Tr. 69-74). The Government on cross-examination elicited that while Sherman Smith was not a friend of appellant, he was an associate of his (Tr. 76-77). Appellant also related that he found out on March 12, that he had been implicated in the assault and robbery of Taylor when a captain of the special police came to ask about the pistol. Holley stated that the captain told him that if he came up with the gun, nothing would happen and the police would not have to become involved. Holley stated that his mother heard this entire conversation. Appellant also reiterated that he arrived at his girlfriend's house from the liquor store at 8:30 p.m., and that he did not run to get there (Tr. 91-94).

The next witness for the defense was the mother of the appellant Mrs. Grace Holley. The substance of her testimony dealt with the number of visits made by the police to her house. In her first recounting of the events, Mrs. Holley indicated that there were three visits by the police,

the first when Detective Mosrie asked her son about the gun, the second when they came with a search warrant and the third when they came to arrest her son. (Tr. 98). On cross-examination, Mrs. Holley stated that about three days after the first visit the police came back with a search warrant and about a week later they arrested her son. Mrs. Holley then indicated that the first time the police came was a Sunday, March 12, 1967 (Tr. 105). Mrs. Holley also indicated that Detective Mosrie was present on all three occasions, and did not recall a *special* policeman ever coming and telling her son that if he did not come up with the gun the police would be told about the incident (Tr. 106). She did remember, however, a regular police officer tell her son something similar (Tr. 108). At this point, the Government requested a recess to have certain testimony of the witness transcribed for impeachment purposes (Tr. 109). No objection was interposed by the defense. After reading Mrs. Holley's previous testimony to her, Mrs. Holley (Tr. 118-124), at this point indicated, in conformity with that testimony, that Detective Mosrie had been to her house only twice not three times (Tr. 124). Thereafter, Mrs. Holley's testimony became extremely confused, stating Detective Mosrie did not have a warrant the first time he came (Tr. 124), but the second time he came; that the search and the arrest did not take place at the same time but that Detective Mosrie didn't come three times; that the third time the police officers came they searched the premises (Tr. 125). Mrs. Holley pressed to reconcile her testimony then retreated to her previous testimony stating that the second time the police came they searched, and the third time they came they arrested her son and that they neither searched or arrested the first time they came (Tr. 126). Mrs. Holley then testified that Detective Mosrie did not come to the house all three times, but only the first and second times (Tr. 127). Upon the completion of Mrs. Holley's testimony the Government requested an impeaching instruction (Tr. 127), which the trial court refused to give after objection by defense counsel (Tr. 133).

The last witness called by the defense was Claythea Taylor, the girlfriend of the appellant at the time of the offense who testified that the appelant came to her house sometime between 8:00 and 8:30 p.m. on the night in question. Miss Taylor also stated that she did not notice a gun on appellant's person that evening (Tr. 140-142). On cross, Miss Taylor indicated that she was not sure of the time of appellant's arrival and that it could have been as late as 9 p.m. (Tr. 148). The defense counsel then rested its case, and renewed its motion for a judgment of acquittal which was again denied (Tr. 144).

In rebuttal the Government recalled Ernest Ward who denied having an altercation with the appellant; that he drove to work on the evening of March 11 or that he possessed a gun (Tr. 145). Detective Mosrie was also called in rebuttal, without objection, and stated that he went to the home of appellant only twice and that he was not there on March 12 (Tr. 150-152).

After closing arguments, and the trial court's charge to the jury charge the jury took luncheon recess at 1:45 p.m. (Tr. 202). The jury thereafter returned to the court with it's guilty verdict at 3:29 p.m. (Tr. 150*-151*).[4]

ARGUMENT

I. Appellant should be foreclosed from raising any objection to the impeachment of Mrs. Holley as no objection was raised in the trial court. Further, the Government merely used Mrs. Holley's prior inconsistent statement to cross-examine her and was "concluded" by her admissions. Any error by use of rebuttal thereafter must be deemed as harmless.

(Tr. 70-71, 73-74, 98-101, 118-124, 126-127, 133, 144, 150-153)

Appellant avers that the trial court improperly allowed impeachment of the defense's witness, Mrs. Holley, by use

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[4] Note pages marked with an asterisk are those which have duplicate numbers and include the proceedings of the afternoon of March 12, 1968, the verdict (Tr. 150-153*), and the proceedings of May 6, 1968, the sentencing (Tr. 154-156*).

of her previous inconsistent testimony at the first trial (Tr. 118-124), and the use of the rebuttal testimony of Detective Mosrie (Tr. 150-153). Appellant premises his argument on the general principle of law that impeachment can not be obtained on collateral matters. Appellant contends that it was incumbent on the trial court to refuse to allow impeachment of Mrs. Holley as to the number of times police officers visited her house and what occurred during those occasions.[5] We note initially that matters involving the scope of cross-examination, admissibility of impeaching and rebuttal evidence are addressed to the sound discretion of the trial court. As has apparently been conceded by appellant (Appellant's Brief p. 9), at no time did appellant object to the cross-examination of Mrs. Holley about prior inconsistent testimony or the rebuttal testimony of Detective Mosrie. Appellant by his failure to invoke the trial court's discretion, should, therefore, be foreclosed from raising the matter on appeal. *Covington* v. *United States*, 125 U.S. App. D.C. 224, 370 F.2d 246 (1966); *United States* v. *Spiro*, 385 F.2d 210 (7th Cir. 1967); *Ray* v. *United States*, 255 F.2d 473 (4th Cir. 1958).

Foreclosure notwithstanding, appellant's claim of error is still without merit. The use of Mrs. Holley's prior inconsistent testimony did not violate the rule enunciated in *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943),[6] since the

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[5] It should be noted that the testimoy regarding how many visits were made by the police to appellant's home and what occurred on those occasions was brought out by defense counsel on direct (Tr. 98-101). It is also submitted that the general thrust of defense counsel's inquiry was toward exploring these matters as opposed random remarks by the witness. Appellant is now in the anomolous position of saying that the substance of the testimony of a witness called by him was collateral to the issues in the case. We would venture that the reason defense counsel raised no objections was because he felt Mrs. Holley's testimony to be material.

[6] "It is true, as appellant contends, that generally the inquiring party is concluded by the witness' answer when cross-examination relates to a matter collateral to the issues, and he may not rebut it for the purposes of impeachment." *Id.* at 21; 135 F.2d at 640.

testimony was only used on cross-examination and the Government was "concluded" by Mrs. Holley's *admissions* to having previously testified inconsistently at the first trial (Tr. 124). No independent evidence was adduced by the Government to prove that these statements had been made, nor was the transcript of the previous inconsistent testimony introduced into evidence.

While the Government did adduce from Detective Mosrie that he had gone to the Holley house on only two occasions, in rebuttal to Mrs. Holley's testimony of three visits, any damage to the credibility of her testimony had already been done *more effectively* by her admission on cross to having previously testified inconsistently.[7] Neither did Mrs. Holley adequately explain away the inconsistency, but rather returned to her contention that the police appeared at her house on three occasions rather than two, although her testimony as to what occurred on the three occasions seemed to conflict with her testimony on direct (Tr. 98, 126-127). The Government submits that the testimony of Detective Mosrie also served another purpose other than rebuttal, i.e., clarifying a matter that was hopelessly obfuscated by the confusing and contradictory testimony of Mrs. Holley. The substance of Detective Mosrie's testimony, in addition, redounded to the benefit of appellant, since he contended, in conformity with the testimony of Mosrie, that the Metropolitan Police had been to his house on only two occasions (Tr. 73-74).

Finally, assuming *arguendo*, the trial court erred in not, *sua sponte*, precluding the Government's use of Detective Mosrie's rebuttal testimony, the alleged error does not meet the standard of Rule 52(b), Federal Rules of Criminal Procedure. The Government had, it is submitted, an extremely strong case against appellant i.e., the testimony of two eye-witnesses, among other things, as against appellant's bizarre account of his leaving the area in question just prior to the commission of the offenses and his

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[7] Note, defense counsel specifically objected to any instruction on impeachment after Mrs. Holley testified (Tr. 133).

altercation with witness Ward (Tr. 70-71); the testimony of his mother containing almost innumerable inconsistencies and finally the inability of appellant's girlfriend to say with precision when appellant had arrived at her house (Tr. 144). The Government submits, therefore, that one can say ". . . with fair assurance, after pondering all that happened without stripping the [alleged] erroneous from the whole, that the judgment was not substantially swayed by the error . . . ." *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946).

II. There was sufficient evidence to prove assault with a dangerous weapon beyond a reasonable doubt. Since appellant does not challenge the sufficiency of the other charge for which he received a concurrent sentence this Court need not reach this issue.

(Tr. 21-22, 30-31, 64-66, 155*)

The contention is raised by appellant that as to the charge of assault with a dangerous weapon, the trial court erred in not granting his motion for judgment of acquittal, made at the end of the Government's case (Tr. 64-66), because there was insufficient evidence to prove this offense beyond a reasonable doubt.[8] We note that no claim is made that there was insufficient evidence to prove the offense of robbery. Since appellant was sentenced concurrently on both offenses to an indeterminate sentence under 18 U.S.C. § 5010(b) of the Federal Youth Corrections Act (Tr. 155*). For this reason it is unnecessary for the Court to reach appellant's contention. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Calhoun* v. *United States*, D.C. Cir. Nos. 21,119, 21,120, decided August 9, 1968.[9]

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[8] *Note*, in his motion for judgment of acquittal, the question of the dangerousness of the weapon used on the complainant was never raised.

[9] *Note*, The Supreme Court has expressed interest in studying again the *Hirabayashi* doctrine and will hear oral argument on the point in the case of *James D. Benton* v. *Maryland*, United States

Beyond this infirmity of appellant's position on the assault count, the Government submits that there was sufficient evidence to convict him of assault with a dangerous weapon. Witness Jackson testified that he saw the appellant step behind the complainant Taylor and hit him in the head with a rock (Tr. 30-31). The complainant stated that when he was hit in the back of the head, he lost consciousness, although he did feel his gun being taken from him (Tr. 21-22). While these facts do not make out a case that the weapon used on the complainant was "dangerous" per se or as a matter of law, the Government submits that under the circumstances shown by the evidence the question of the rock's "dangerousness" was a matter for the jury to decide. Cf. *Greenfield* v. *United States*, 119 U.S. App. D.C. 278, 341 F.2d 411 (1964).[10]

In elucidating a standard to determine when the trial court should take the question from the jury, this Court has said, "the judge must assume the truth of the Government's evidence and give the Government the benefit of all reasonable inferences to be drawn therefrom," *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947).

This Court further stated that where there is evidence from which "a reasonable doubt or no reasonable doubt is possible," the question is for the jury. *Id.* at 393, 160 F.2d at 232. The Government submits that the jury could reasonably infer from the fact that the rock was thrown at the head of the complainant rendering him unconscious, that the instrumentality was something that was "likely to produce either death or great bodily harm," as the trial

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Supreme Court Docket No. 201 on March 24, 1969. We note also, however, that this Court has recently relied on *Hirabayashi* to dispose of certain claims raised in *(Sammie) Jackson* v. *United States*, D.C. Cir. No. 21,327, decided February 3, 1969.

[10] The instrumentality in *Greenfield* was a "pop bottle." The Court held that because the question of "dangerousness" was one for the jury, the failure of the trial Court to give a requested instruction on simple assault was prejudicial error. The Government notes that no such request for a simple assault instruction was made in this case.

court correctly instructed (Tr. 196).[11] The Government also notes that the test of the sufficiency of evidence is not that it *compels* the trier of fact to find guilt beyond a reasonable doubt, but, rather, whether the evidence "is *capable* of or sufficient to pursuade the jury to reach a verdict of guilty by the requisite standard." *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 158, 375 F.2d 332, 334 (1967).

III. Failure to provide appellant with an alleged Jencks Statement which the Government did not have in its possession was harmless error where appellant otherwise obtained the information from other Jencks Statements provided by the Government.

(Tr. 21-24, 37-38)

Appellant argues that the failure of the Government to provide him with a copy of the affidavit to the Search Warrant served on him on March 16, 1967, constituted a violation of the Jencks Act,[12] and that the decision of the trial court should be reversed on this ground. Assuming *arguendo*, that through the Government's negligence the search warrant affidavit was lost, and also assuming *arguendo* that the objection to going forward without this document was properly raised [13] we submit that *Rosenberg*

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[11] The fact that in this case the weapon used did not cause "death or great bodily harm" does not necessarily preclude a finding of dangerousness. *Cf. McGill* v. *United States*, 106 U.S. App. D.C. 136, 270 F.2d 329 (1959).

[12] 18 U.S.C. § 3500. The question of responsibility for loss of the affidavit is arguable on this record. While the Government's trial counsel stated that she had secured such from the clerk's office (Tr. 24), she was under the assumption that it had either been placed in the trial jacket of the case (a search of which revealed it not to be there), or that it had been returned to the clerk's office where it had previously been kept on file (Tr. 22-24). There is also some indication that the affidavit may have come into the custody of the defense at the first trial. The Exhibit Sheet of the first trial indicates that "part of a search warrant" was identified as a defense exhibit (Record No. 7).

[13] The Government submits, alternatively to its harmless error position, that appellant abandoned his request for production of

v. *United States*, 360 U.S. 367 (1959), is dispositive. In that case the Supreme Court held the failure of the Government to turn over a typewritten copy of an original that had been turned over to the defense to be harmless error. The court stated *id.* at 370:

> No relevant purpose could have been served by giving petitioner's counsel a typewritten copy of a document which he had already given in its original form, no advantage was denied by withholding it.[14]

The statements attributable to Donald Taylor on the affidavit were already known to the defense through the P.D. 163 and P.D. 251 handed to appellant on his request (Tr. 21-23) (See Supplemental Record filed February 6, 1969.) That appellant had such knowledge is further evidenced

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the Jencks Act Statement. No request by defense counsel was made for a recess to try and secure the affidavit from the clerk's office (albeit a fruitless search), neither did counsel object when the court requested that he proceed with his cross-examination of the witness with the Jencks Statements that had already been given him (Tr. 24). Though recesses were taken *throughout* the trial our study of the trial record reveals no instance during which defense counsel had checked the clerk's office and that he was unable to secure the affidavit there. Also noteworthy in this regard is the fact that the Criminal Clerk's Office of the Court of General Sessions keeps a copy of every search or arrest warrant issued from the Court of General Sessions (as is the situation in the case at bar). These warrants are cross-indexed alphabetically, by place of service and by date. Appellant's present counsel has apparently availed himself of those services to secure the copy he attaches to his brief. Appellant's trial counsel, a criminal lawyer for many years could well have been aware of these facilities as an alternative method of procuring the affidavit in question. As was said in *Lewis* v. *United States*, 340 F.2d 678, 682-83 (8th Cir. 1965):

> There is such a thing as abandonment of a request for production under the Jencks Act which forecloses any issue being made in respect thereto on appeal. *Cf. Harrison* v. *United States*, 115 U.S. App. D.C. 249, 318 F.2d 220 (1963) and *United States* v. *Paroutian*, 319 F.2d 661 (2d Cir. 1963).

[14] See also *Killian* v. *United States*, 368 U.S. 231 (1961); *United States* v. *Knox Coal Company*, 347 F.2d 33 (3d Cir. 1965); *United States* v. *Dickerson*, 347 F.2d 783 (2d Cir. 1965); *United States* v. *Sten*, 342 F.2d 491 (2d Cir. 1965).

by the question put to the witness Mosrie in an effort to impeach the testimony of Taylor (Tr. 37-38).[15]

Although not argued by appellant in his brief nor raised at trial, it is arguable that the affidavit to the search warrant could also have constituted a Jencks Act Statement of Detective Mosrie.[16] We note, however, that virtually all the relevant facts found in that document also appear in the P.D. 163 and P.D. 251. The information on the search warrant-affidavit, therefore constituted information "otherwise obtained by defense counsel," [17] and any failure on the part of the Government to provide the affidavit at trial, it is submitted, should be considered harmless error.[18]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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United States Attorney.

FRANK Q. NEBEKER,
DANIEL E. TOOMEY,
Assistant United States Attorneys.

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[15] Detective Mosrie in answer to defense queries stated affirmatively that complainant Taylor had talked to him and told him that three of four persons had "copped" him from behind, and another had taken his gun (Tr. 37-38). See *Killian* v. *United States, supra* n. 14; *United States* v. *Sten, supra* n. 14.

[16] 18 U.S.C. § 3500(e)(1). See discussion Shadoan, Law and Tactics in Federal Criminal Cases 203-208 (1964).

[17] *Cf. Williams* v. *United States*, 119 U.S. App. D.C. 177, 181, 338 F.2d 286, 290 (1964), distinguishing *Rosenberg, supra*, on the ground the information erroneously withheld from appellant there was not "otherwise obtained by defense counsel."

[18] Note, as was the case in *Lewis* v. *United States, supra* n. 13 at 684, "[a]ppellant's guilt of the charge[s] . . . against him . . . was established beyond a reasonable doubt by competent testimony other than that given by" either Taylor or Mosrie.

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BRIEF IN REPLY

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

N. 21,993

KENNETH L. HOLLEY, Appellant

v.

THE UNITED STATES OF AMERICA, Appdlee

Appeal from the United States District Court for the
District of Columbia

Albert Philipson, Esq.
Counsel for appellant
(appointed by this Court)
828 17 th Street, N.W.
Washington, D.C.

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Argument

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I. It was not permissible for the Government to read into the record Mrs. Holley's testimony at a prior trial which was inconsistent to testimony given the trial at hand.

The Government suggests that it was permissible to read into the record Mrs.Holley's testimony in the prior trial which was inconsistent to her testimony in the trial at hand. This is not correct.

"The commonly accepted broad statement of the rule is: 'No contradiction shall be permitted on "collateral" matters'." Ewing v. U.S., 77 U.S. App. D.C. 14, 135 F 2d 633 (1942) at 640. Self contradiction is contradiction. Thus, "self contradiction of a witness by prior statements may be shown only on a matter material to the substantive issues of the case." (emphasis added) Cwach v. U.S., 212 F 2d 520 (8 cir. 1954). See also Butts v. Curtis Publishing Co., 225 F.Supp 916, affirmed 351 F 2d 702, affirmed 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094; Patterson v. U.S., 361 F 2d 632 (1966).

The Government asserts that no independent evidence was adduced to prove that Mrs. Holley had made any prior inconsistent statements, and that the statements were not "introduced into evidence." Yet, the transcript of her previous testimony was read into the record, she was questioned about it , and asked if she had made the prior statements. (Tr. 123-124). Clearly then the inconsistency was "shown".

II. The information contained in the affidavit in support of the search warrant was not otherwise obtained by the defense counsel through the Jencks statements produced at trial.

In the affidavit in support of the search warrant, Officer Mosrie stated that the instrument used in the assault was an "unknown object." This information was not "otherwise obtained by the defense counsel" through the Jencks statements produced at trial since both of the Jencks statements stated that the weapon used was a brick. Had the defense counsel at trial been appraised of the inconsistency of Mosrie's writings he would have pursued that matter and thus focused attention on the area which was mentioned in appellant's brief, ie, whether there was substantial evidence of assault with a deadly weapon inview of the fact that there was no evidence as to the nature of the weapon used. Had the defense counsel been alerted as to the uncertainty of the instrument used, he would have been in a position to arug this point specifically in his motion for judgment of acquital.